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No. 21,296

United States Court of Appeals
For the Ninth Circuit

ANNA L. SANCHEZ, *Appellant,* vs. KANO KAWAMURA, JAPANESE CONSULATE, et al., *Appellees.*	

APPELLANT'S OPENING BRIEF

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JURISDICTION

This case is before the Court upon appeal from a decision of the United States District Court rendered on July 5, 1966. Judgment thereon was filed July 26, 1966. The decision of the District Court granted defendants' motion to dismiss on the basis that a period of one year had run from the date of the accident to the date of filing of the complaint in this action in the District Court. This Court has jurisdiction under 28 U.S.C. 1291.

was named as driver of the vehicle involved, and not described in any other particular fashion.

Kawamura was duly served, and on February 12, 1965, five and one-half months after the accident, he

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STATEMENT OF FACTS

On September 1, 1964, plaintiff and appellant, Anna L. Sanchez, while a pedestrian in San Francisco, California was struck by an automobile. The auto was operated by defendant and appellee, Kano Kawamura.

Sixteen days later, on September 17, 1964, Sanchez filed an action for personal injuries in the Superior Court for the City and County of San Francisco, naming Kawamura as a defendant. Her pleading was a general form negligence complaint, and nowhere therein was Kawamura identified as a vice-consul; he was named as driver of the vehicle involved, and not described in any other particular fashion.

Kawamura was duly served, and on February 12, 1965, five and one-half months after the accident, he

filed his answer. It was a general form answer, raising ordinary negligence defenses. His answer neither attacked the jurisdiction of the Superior Court, nor identified him in any way as vice-consul of Japan.

On June 10, 1965, depositions were taken in that matter, and Kawamura testified to his vice-consular status. Thereafter, in October, 1965, more than one year after the accident, appellee moved the California court for dismissal of the action; his grounds were lack of jurisdiction. At the present time, that motion remains off calendar.

On November 26, 1965, appellant filed the within action in the United States District Court. That complaint identified appellee as vice-consul of Japan in order to show jurisdiction in the Federal Court. Other than that, it was a standard form personal injury complaint, based on negligence. Inadvertently, it alleged nothing of the prior state court proceedings.

Kawamura moved for dismissal of the Federal Court complaint on the grounds that the California statute of limitations (one year) was applicable. The matter was argued on that question, with appellant taking the position that laches should apply. The District Court granted the motion for dismissal on July 5, 1966.

Judgment thereon was filed July 26, 1966. Notice of Appeal was filed and this appeal followed.

Pending this appeal, appellant directed a motion to the District Court asking that the judgment of dismissal be set aside and that she be permitted to file an

amended complaint, setting up the prior timely state court proceedings. That motion was denied and notice of appeal from that denial has been filed. Although no request for consolidation on appeal has been filed as yet, appellant intends to do so as soon as the transcripts on appeal are complete and filed. Therefore, appellant prepares this brief on the theory that the matters will be consolidated into one appeal and that all points involved can be argued.

ARGUMENT

A. THE MOTION FOR RELIEF UNDER RULE 60-B OF THE FEDERAL RULES OF CIVIL PROCEDURE WAS TIMELY FILED AND WAS PROCEDURALLY CORRECT.

I

The motion was filed within one year of the Order of Dismissal.

Federal Rules, Civil Procedure, Rule 60-B;
Bookout v. Beck, 354 F. 2d 823, 825 (1965, C.A. 9).

II

The procedure followed, applying preliminarily to the District Court for relief from the Order of Dismissal, pending appeal, before applying to the Court of Appeals for a remand, has been approved by your Honorable Court.

Greear v. Greear, 288 F. 2d 466 (1961, C.A. 9);
Creamette Co. v. Merlino, 289 F. 2d 569 (1961, C.A. 9).

B. THE MOTION FOR RELIEF SHOULD HAVE BEEN GRANTED; IT WAS AN ABUSE OF DISCRETION TO FAIL TO ALLOW THE FILING OF AN AMENDED COMPLAINT.

I

Concededly, such a motion is addressed to the sound discretion of the trial court, and that court's ruling will not be ordinarily disturbed on appeal without a showing that its discretion has been abused.

> *Gunther v. San Diego and A.E. Ry. Co.,* 336 F. 2d 543, 549 (1964, C.A. 9); reversed on other grounds, 382 U.S. 257 (1965).

II

Here, however, where the state court action was filed within a month of the accident, and where the defendant filed an answer within four and one-half months of the accident, defendant cannot [claim] he is suffering detriment. The purpose of the statute of limitations, the prevention of stale claims, cannot be served by allowing the dismissal of this action, and also the state court action, on the grounds of lack of jurisdiction. Unless the motion for relief under 60-B is granted, this Court cannot make a full consideration of all of the problems involved. Without the record being amplified to include the allegations with respect to the state court proceedings, this Court cannot consider all of the factors in this case, nor can it achieve substantial justice.

(a) The facts with respect to the prompt filing and service of the state court action, the answer thereto, and the discovery proceedings therein, are unrebutted.

Obviously, defendant had ample and timely notice of plaintiff's claim.

(b) The ineptly pleaded complaint, originally filed in the District Court, fails to allege the state court proceedings, including the discovery proceedings. It is a bare statement of a cause of action, and on its face shows that it was filed some fourteen months after the accident. The narrow legal issue presented by the motion to dismiss that complaint—i.e., whether or not the one-year California statute of limitations applies, or whether laches should be applied—is a far different matter from the issues truly involved in the case and which must be considered in order to provide substantial justice.

(c) Where no reason appears for the denial of the relief requested, and where no damage can flow to the other party by granting said relief, it is an abuse of discretion to deny the relief.

> *United States v. Backofen*, 176 F. 2d 263 (1949, C.A. 3).

> "An appellate court is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion."
>
> *Virginian Ry. Co. v. Armentrout*, 166 F. 2d 400, 408 (1948, C.A. 4).

> "Abuse is ordinarily established by showing that the trial court acted without authority, (citing cases) . . . for an erroneous reason (citing cases) . . . *or arbitrarily and without justification in the light of all the circumstances as shown by*

a review of the record as a whole . . .". (Emphasis added)

Somerville v. Capital Transit Co., 192 F. 2d 413, 414 (1951, C.A. D.C.).

"Although the granting of a continuance or of motions for vacation of judgment and for new trial are addressed to the discretion of the trial court, that discretion must be exercised in the interest of justice."

Cornwell v. Cornwell, 118 F. 2d 396, 398 (1941, C.A. D.C.).

C. THE PROPOSED AMENDED COMPLAINT STATES A CAUSE OF ACTION, NOT BARRED BY THE STATUTE OF LIMITATIONS.

I

On the face of the state court complaint, the California court had jurisdiction of the parties and the subject matter. On the face of the answer, that jurisdiction remained. The answer failed to raise the jurisdictional issue or any immunity issue, and, in fact, did not define or point out in any way the vice-consular status of Mr. Kawamura.

Constitution, State of California, Article VI, Section 5.

II

State courts have been held to have actual jurisdiction over matters involving vice-consuls as defendants.

Domestic relations and probate matters have been excluded from the effect of the section.

Ohio Ex. Rel. Popovici v. Agler, 280 U.S. 379, 50 S.Ct. 154 (1930);

Urdanetta v. Urdanetta, 37 N.Y.S. 2d 601 (1942).

And where the defendant consul or vice-consul has defaulted, or failed to raise the question before judgment is rendered, the state court jurisdiction has been upheld.

Gonzalez v. Wagner, 64 F. Supp. 737 (1946, D.C., S.Dist.Tex.);

Bliss v. Nicolaif, 79 N.Y.S. 2d 63 (1948);

Koppel v. Heinrichs, 1 Barb. 449 (1847, N.Y.);

Hall v. Young, 20 Mass. 80 (1825).

III

Plaintiff here has not "slept on her rights", as the traditional ban on stale claims has often been expressed. While defendant may not be able to waive jurisdiction, or might be immune from the doctrine of estoppel to assert jurisdiction, he certainly has the power to waive the defense of statute of limitations, and his conduct in this case would appear to be such a waiver. Defendant not only filed an answer in the state court, but took part in discovery proceedings.

IV

It would seem logical that if the state court has jurisdiction against a vice-consul who defaults, it

would have apparent jurisdiction against a vice-consul who answers and does not raise the jurisdictional issue. Its jurisdiction has been upheld where he stipulates to judgment.

> *Gonzalez v. Wagner,* 64 F. Supp. 737 (1946, D.C., S.Dist.Tex.).

V

On the facts of this situation, with the timely state court filing, and with the delay in the raising of the jurisdictional issue, the state court had actual or apparent jurisdiction up to the time the motion to dismiss was submitted thereto. Thus, the statute of limitations should be tolled by the state court filing. To hold otherwise under this fact situation would be to ignore the reason for the statute of limitations as a defense, and to perpetrate a manifest injustice. Certainly, this plaintiff, or other plaintiffs so situated, might well be totally entrapped by the lack of knowledge that the defendant happened to be entitled to vice-consular immunity from state court suit.

The Supreme Court of the United States has repeatedly held that the statute of limitations should be tolled in situations where the action was filed in the wrong court and later dismissed. They have not so ruled in a case involving absolute lack of jurisdiction, but, as indicated above, this is not a case of absolute lack of jurisdiction.

> *Burnett v. New York Central Railroad Co.,* 380 U.S. 424, 85 S.Ct. 1050 (1965);

Herb v. Pitcairn, 325 U.S. 77, 65 S.Ct. 954 (1945);

Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467 (1962).

D. EVEN ON THE BASIS OF THE EXISTING PLEADING, ASSUMING THE AMENDED PLEADING IS NOT ALLOWED, LACHES SHOULD BE APPLIED IN THIS CASE RATHER THAN A STATE STATUTE OF LIMITATIONS.

The statutory requirement that actions against a vice-consul be brought in the Federal Court (28 U.S.C.A. 1351) creates an immunity from state court suit that is not based on international law.

Anderson v. Villela, 210 F. Supp. 791, 792 (1962, U.S.D.C., Mass.).

The purpose of the statute is to provide uniform treatment for vice-consuls and consuls of foreign states. In our case, the District Court, in the body of its Order of Dismissal, dated July 5, 1966, put the problem precisely. It said, at page 2 thereof:

"Neither the reported cases nor the legislative history of Section 1351 offer a clear guide to the resolution of the problem now under consideration. This Court is therefore forced to choose between the applicable state law and a rule derived from principles of Federal common law.

"Although the advisability of uniform regulation of the officials of foreign sovereigns indicates the possible undesirability of applying principles of state law, . . .".

The court then adopted the local statute of limitations on the theory that, in the absence of direction by

Congress, that is the acknowledged rule. However, it is respectfully submitted, that the purpose of this particular statute is not served by that application and that this statute should be uniformly applied to all suits against consuls or vice-consuls.

There are available, for comparison, applicable statutes of limitations imposed by Congress in federally created rights matters. Examples would be F.E.L.A. cases or Jones Act cases.

It should be carefully noted that the Federal Court, in a vice-consul case, is not "merely another court of the state" as referred to in *Holmberg v. Armbrecht,* 327 U.S. 392, 66 S.Ct. 582 (1946). It is, per the statute, the only court that could hear the case.

SUMMARY

For the reasons set forth herein, it is respectfully submitted that if plaintiff's action is allowed to die, on the basis of failing to meet the bar of the statute of limitations, a manifest injustice will occur. As has been noted several times, defendant had ample notice of the claim and took active part in the defense thereof before the statute of limitations ran. It is respectfully submitted that the most appropriate vehicle to reach a just result would be to permit the filing of the amended complaint, and to hold that the defendant has waived the statute of limitations by his active role in the state court proceedings. In any event, he should not be allowed to prevail on the basis of an unduly limited record on appeal, without con-

sideration of the justice of the cause and the merits of the controversy.

Dated, San Francisco, California,
June 27, 1967.

Respectfully submitted,
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By Victor J. Van Bourg,
By George DeRoy,
Attorneys for Appellant.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

George DeRoy,
Attorney for Appellant.